85-1126

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Petitioner

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QUESTIONS PRESENTED

1. May a petition for review of an administrative order which establishes a new agency policy be dismissed on the ground that it is not ripe for review, although it is an open legal question whether any court will have jurisdiction to review the legality of that policy when it is applied?

2. Where an agency's decisions are subject to review under the Administrative Orders Review Act, is the legality of a policy announced by the agency in a formal rulemaking proceeding reviewable within sixty days of the agency's decision in that proceeding, within sixty days of any agency decision applying that policy, or both?

PARTIES TO THE PROCEEDING BELOW

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers
American Trucking Associations, Inc.
Film, Air and Package Carriers Association
Interstate Carriers Conference
National Tank Truck Carriers, Inc.
Oilfield Haulers Association
Oregon Trucking Association, Inc.
Regional and Distribution Carriers Conference
Regular Common Carrier Conference
Specialized Carriers and Rigging Association
Interstate Commerce Commission
United States of America
Association of American Railroads
Patrick W. Simmons

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The original opinion of the Court of Appeals for the Ninth Circuit is not reported; it is reprinted in the Appendix ("App.") hereto at pp. 1a-2a. The opinion of the Court of Appeals, as amended on rehearing, is reported at 770 F.2d 810. It is reprinted, together with the order denying rehearing at App. pp. 3a-7a. The decision of the Interstate Commerce Commission ("ICC") is not yet officially reported; it is reprinted at App. 8a-37a.

JURISDICTION

The decision of the Court of Appeals was issued on July 26, 1985 and a timely petition for rehearing was denied on September 4, 1985. On November 25, 1985,

Justice Rehnquist granted an extension of time to file this petition to January 2, 1986. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 2321 and 2342(5).

STATUTES INVOLVED

This case involves the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and the Administrative Orders Review Act of 1950 ("Hobbs Act") 28 U.S.C. § 1341 *et seq.* These are set forth in pertinent part at App. pp. 38a-39a, *infra*.

STATEMENT OF THE CASE

The issues in this case arise because the ICC and the United States (jointly "the government") have taken squarely inconsistent positions in this case and in a related proceeding concerning the timing of judicial review of the legality of policies adopted by agencies which are subject to the Hobbs Act. Specifically, the government successfully contended in the court below that review of such a policy may be had only in a case in which it is applied; but the government has elsewhere contended that the Courts of Appeals are without jurisdiction to consider a policy when it is applied because such review is timely only if sought within sixty days of its original promulgation by the agency. A brief description of the related and contemporaneous proceedings in which the government has asserted these mutually inconsistent positions is, therefore, necessary to place the present petition in its proper context.

A. The Licensing Litigation

In a formal rulemaking proceeding, initiated by notice and request for public comment, the ICC abolished what has been known as the "special circumstances" doctrine for *licensing* railroads or rail affiliates to perform motor carrier operations. *Ex Parte No. MC-156, Motor Carrier*

Operating Authority—Railroads 132 M.C.C. 978 (served Jan. 6, 1983). Under that doctrine—in existence since 1938 and approved by this Court [1]—railroads and railroad affiliates were granted motor carrier operating authority only insofar as it is "auxiliary to or supplemental of train service", unless the applicant demonstrated "special circumstances" justifying an exception to that limitation. Within sixty days of this decision, American Trucking Associations, Inc. ("ATA") and others which had opposed abandonment of the doctrine petitioned for review thereof in the Fifth Circuit. The International Brotherhood of Teamsters ("IBT"), which represents employees in the trucking industry, intervened in support of that petition. The Association of American Railroads and other railroad interests intervened on the side of the ICC and the United States in support of the agency decision. Neither the government nor the railroads contended that the policy statement was not ripe for review, and the Court of Appeals, without discussing ripeness, decided the case on the merits, sustaining the ICC's new licensing policy. *American Trucking Associations, Inc., et al.* v. *Interstate Commerce Commission, et al.*, 722 F.2d 1243 (5 Cir. 1984). Thereafter, this Court denied ATA and IBT's petition for certiorari, —— U.S. ——, 53 U.S.L.W. 3324 (1984).

During the course of these appellate proceedings, the ICC applied its new policy to grant an application by a railroad for general motor carrier operating authority without a showing of "special circumstances" *Denver and Rio Grand Western Railroad Company, Extension* (1983) (unreported). Tri-State Motor Transit Co., which had opposed the application before the ICC, and the ATA and IBT (which had unsuccessfully moved to intervene) filed

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[1] *See, e.g., Kansas City Southern Transport Co., Common Carrier Application*, 10 M.C.C. 221 (1938); *American Trucking Assns.* v. *U.S.*, 355 U.S. 141 (1957); *American Trucking Assns.* v. *U.S.*, 364 U.S. 1 (1960).

a petition for review of that decision in the Eighth Circuit. They argued that the policy announced in *Ex Parte MC-156* was illegal and that the ICC therefore erred in granting the license. In response, the government argued, *inter alia*, that the Court of Appeals was without jurisdiction to consider the merits of the ICC's licensing policy, asserting that the policy announced in *Ex Parte MC-156* was reviewable only for sixty days thereafter by virtue of the Administrative Orders Review Act (Hobbs Act). The Eighth Circuit rejected this jurisdictional contention but on the merits *affirmed* the ICC's order. *Tri-State Motor Transit Co., et al.* v. *ICC*, 739 F.2d 1373 (8 Cir. 1984). Despite this success, the government petitioned that Court for rehearing, or rehearing *en banc*, on the Hobbs Act issue. When this petition was denied, the government petitioned for certiorari (No. 84-1515) on that issue and urged that it be decided even if the petitions of the trucking companies and IBT for review on the merits (No. 84-1518) were denied. This Court denied both petitions for certiorari. —— U.S. ——, 53 U.S.L.W. 3895 (June 24, 1985).

B. The Present, Acquisitions Litigation

1. *The Interstate Commerce Commission*

By notice of proposed policy statement published at 48 F.R. 37,539 (August 19, 1983) the ICC sought public comment on the continued use of the "special circumstances" doctrine in rail and rail-affiliated motor carrier *acquisitions* of motor carriers. That issue had been expressly reserved by the agency and by the Fifth Circuit in the original licensing proceeding. Thereafter, the ICC issued its decision in this case, concluding as follows:

> After analysis of the statute, its legislative history, prior Commission and judicial interpretation of the statute, recent statutory changes, changes in the economics of the rail and motor industries, and

> the comments of interested parties, we conclude that the "special circumstances" doctrine should be eliminated as a presumption where a railroad or rail-affiliate seeks to acquire a motor carrier. Instead, we shall examine applications under 49 U.S.C. 11344 (c) on an individual case-by-case basis. [App. pp. 19a-20a, *infra.*]

49 U.S.C. § 11344(c) is the codification of statutory language adopted in the Motor Carrier Act of 1935, reenacted in the Transportation Act of 1940 and retained without change when the Interstate Commerce Act was revised in 1980 to substantially deregulate the railroad and motor carrier industries. It reads as follows:

> When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition.

The ICC acknowledged that "in the past, the Commission had interpreted the words 'in its operations' to mean 'in its *rail* operations.'" (App. p. 28a *infra*, emphasis in original.) So had this Court.[2] Nevertheless, the ICC concluded that it was free to reinterpret § 11344(c) "to refer to the overall transportation activities of the carrier seeking to acquire the motor carrier", *id.*, and having so reinterpreted the statute, it eliminated the "special circumstances" doctrine for rail acquisitions of motor carriers.

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[2] *See, e.g., United States* v. *Rock Island Co.*, 340 U.S. 419 (1951); *American Trucking Assns.* v. *U.S.*, 355 U.S. 141 (1957); *American Trucking Assns.* v. *U.S.*, 364 U.S. 1 (1960).

2. ***The Court of Appeals***

Several trucking associations and the IBT petitioned for review in the Court of Appeals for the Ninth Circuit to review the ICC's policy statement in *Ex Parte No. 438*, urging that the policy is contrary to the congressional command in § 11344(c). The ICC (joined by the United States) and the American Association of Railroads supported the agency's decision on the merits, and contended additionally, as they had not on review of the licensing policy statement, that the petitions should be dismissed on the ground that the policy statement would not be ripe for review until it is applied in an acquisitions proceeding.

In reply on the latter issue, the petitioners stressed the inconsistency between the contention that at present the ICC proceeding was unripe for review and the government's position in the *Tri-State* case, *supra*, which was then pending on a petition for certiorari: "[W]hereas the government is asserting in the *Tri-State* case that its policy statement may not be challenged on review of a decision in which the agency actually applies it, it here argues that 'development of the policy announced in Ex Parte No. 438 in the concrete medium of an actual application would appear to be the more appropriate vehicle for reviewing the policy statement.'"[3] Petitioners urged that as long as the government maintains that review of an ICC policy statement may *not* be had when the policy is applied and this Court has not rejected that contention, dismissal of the petitions as unripe would create the risk that the legality of the policy statement could *never* be reviewed.

On July 26, after this Court had denied certiorari in *Tri-State*, the Ninth Circuit dismissed the petitions for review. Its opinion read in full as follows:

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[3] Reply Brief of Petitioner International Brotherhood of Teamsters, etc., pp. 2-3, quoting the brief of the ICC and United States below.

> Petitioners challenge an Interstate Commerce Commission (I.C.C.) decision to abandon the practice of allowing railroads to acquire motor carriers only to aid its rail operations in special circumstances, Acquisition of Motor Carriers by Railroads, I.C.C. No. 438 (July 20, 1984).
>
> Petitioners have not shown that the regulation immediately affects their day-to-day affairs. The petition is dismissed because the challenge is not ripe for judicial review. *See Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 164-66 (1967). [App. p. 2a, *infra.*]

IBT filed a petition for rehearing, urging that since the denial of the ICC's petition in *Tri-State* left the Hobbs Act issue unresolved, the Court of Appeals' dismissal of the petitions in this case gave rise to the possibility that petitioners would never be able to obtain review of the ICC's ruling in *Ex Parte 438*. On September 4, 1985, the Ninth Circuit denied that petition, but issued a new opinion, which added the following paragraph:

> Judicial review will be available to challenge an order of the I.C.C. that applies I.C.C. Rule No. 438 to a specific factual situation. *See id.* [App. p. 7a, *infra*, referring to *Toilet Goods, supra.*]

REASONS FOR GRANTING THE WRIT

Taken together, the government's submissions in *Tri-State* and in this case add up to the untenable proposition that judicial review of agency policy statements may be had only in some *other* proceeding:

> "You couldn't have it if you *did* want it," the Queen said. "The rule is, jam to-morrow and jam yesterday—but never jam *to-day*."
>
> "It *must* come sometimes to 'jam to-day,'" Alice objected.
>
> "No, it can't," said the Queen. "It's jam every *other* day: to-day isn't any *other* day, you know."[4]

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[4] L. Carroll, *Through the Looking Glass*, c. V.

The intolerable confusion which the government has created by alternatively invoking ripeness doctrine and a highly restrictive interpretation of the Hobbs Act should promptly be remedied by this Court. As we show herein, this case presents an appropriate vehicle for doing so. Since Congress did not intend judicial review to be a mere Looking Glass illusion, the Ninth Circuit's dismissal on the ground that the *Ex Parte 438* policy was not ripe for review is inconsistent with the principles established by this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). Moreover, while the government's position on the meaning of the Hobbs Act is, in our view, incorrect, the Courts of Appeals and potential litigants would greatly benefit from a definitive ruling by this Court either sustaining or rejecting that theory.

I. THE DECISION BELOW IS INCONSISTENT WITH IMPORTANT PRINCIPLES OF ADMINISTRATIVE LAW ESTABLISHED BY THIS COURT

Abbott Laboratories, supra, established two fundamental principles of federal administrative law. First, it declared a presumption that administrative actions are judicially reviewable. "Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. *See also id.* at 141: "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Second, the Court reaffirmed the principle that administrative action will ordinarily be reviewed only "in the context of a controversy 'ripe' for judicial resolution" (*id.* at 148), and refined the concept of ripeness:

> Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative

> policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. [387 U.S. at 148-149, footnote omitted.]

There is no inherent tension between these holdings, for the function of *Abbott's* ripeness standards is to avoid "premature adjudication" (*id.* at 148), rather than to oust review altogether in contravention of the presumption of reviewability. This is well illustrated by *Toilet Goods Assn.* v. *Gardner*, 387 U.S. 158 (1967), the companion case to *Abbott* which was cited by the court below. In dismissing as unripe an action for preenforcement review of a regulation which required inspection of certain manufacturing facilities and processes, this Court there determined that "no irremediable adverse consequences flow *from requiring a later challenge* to this regulation by a manufacturer who refuses to allow this type of inspection." *Id.* at 164-165 (emphasis added). *See also id.* at 165-166. In short, as this Court has since observed, "ripeness is peculiarly a question of timing." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974).

If the Court of Appeals had held that a petition for review of an administrative agency's policy statement or rule can be dismissed as unripe even though the petitioner may be adversely affected thereby without having a subsequent opportunity to obtain judicial review, the importance of such a holding and its inconsistency with the principles established in *Abbott* would be obvious. The effect of the Court of Appeals' decision herein is the same as if it had squarely articulated such a novel ruling on ripeness because, in light of the government's position in *Tri-State*, it is an open question whether, under the Hobbs Act, a Court of Appeals would have jurisdiction to

consider the legality of the *Ex Parte 438* policy on review of an ICC order allowing such an acquisition. The Ninth Circuit's belief, expressed on rehearing, that review of the policy could be had in such a proceeding cannot resolve the problem. That view would not be binding on a Court of Appeals or this Court in a future proceeding when the policy is applied.

A further factor which undermines the assurance that the Court below sought to give is that three circuits have held that the Hobbs Act time limit is jurisdictional, a proposition stressed by the government in its petition for certiorari in *Tri-State*.[5] If that view is sound, it would appear to be open to the government to argue, as it had in *Tri-State*, that the ICC policy is no longer reviewable, or for the parties to the acquisition to so argue, or for a court to raise the issue *sua sponte*. And while, in a pending case on review of the first acquisition which the ICC approved on the basis of the *Ex Parte 438* policy, the government and the merging carriers have acknowledged the jurisdiction of the D.C. Circuit to consider the validity of that policy,[6] that court would, as indicated, be free to raise the issue on its own. Moreover, if that case were to reach this Court on the merits, the government might reassert its *Tri-State* interpretation of the Hobbs Act; after all, it did not hesitate to present it in that case despite its conflicting posture before the Ninth Circuit in this case.

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[5] *See* Petition for Certiorari, No. 84-1515, pp. 11-12, citing *Natural Resources Defense Council* v. *NRC*, 666 F.2d 595, 601-602 (D.C. Cir. 1981); *Geller* v. *FCC*, 610 F.2d 973, 977-978 (D.C. Cir. 1979); *New York* v. *United States*, 568 F.2d 887, 892 (2 Cir. 1977); *Chem-Haulers, Inc.* v. *United States*, 536 F.2d 610, 613-614 (5 Cir. 1976), *Microwave Communications, Inc.* v. *FCC*, 515 F.2d 385, 389, 390 (D.C. Cir. 1974).

[6] *International Brotherhood of Teamsters, etc., et al.* v. *Interstate Commerce Commission, et al.* (D.C. Cir. Nos. 85-1397 and 85-1404) (Norfolk Southern/North American Van Lines Merger).

Under these circumstances, the decision below is inconsistent with both of the key holdings of *Abbott:* (1) It transforms the ripeness doctrine from a regulation of the *timing* of procedural review into a potential barrier to review at any time; and (2) thereby potentially immunizes agency decisions from review without any indication of a Congressional intent to do so.

II. THE PROPER TIMING OF REVIEW OF ADMINISTRATIVE POLICIES ISSUED IN FORMAL RULEMAKING PROCEEDINGS IS AN IMPORTANT QUESTION WHICH THIS COURT SHOULD NOW DECIDE

When it urged this Court to decide whether the Hobbs Act permits review of a policy which an agency had issued in a prior rulemaking proceeding, the government declared that "this case presents questions of recurring and practical importance that warrant this Court's review." [7] The significance which the government attaches to the issue is further reflected by the truly extraordinary circumstance that the government filed the petition in *Tri-State* although it had prevailed on the merits in the Court of Appeals, obtaining an order which sustained the ICC's grant of the challenged operating authority to the Rio Grande railroad. Moreover, the same federal parties, the ICC and United States, filed a petition for certiorari raising this Hobbs Act issue in a case arising out of the Fifth Circuit, where they had also prevailed on the merits. *ICC* v. *Texas* (No. 84-1712), seeking review of *Texas* v. *United States* 730 F.2d 409, amended on rehearing, 749 F.2d 1144 (5 Cir. 1984). This Court denied the government's petition for certiorari in *Texas* on the same day that it denied certiorari in *Tri-State*, —— U.S. ——, 53 U.S.L.W. 3895.

The decision of the Court of Appeals herein adds a further dimension which, even standing alone, would clearly warrant review of the Hobbs Act issue by this

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[7] Pet. for Certiorari, No. 84-1515, p. 6.

Court. There are now at least two vying positions concerning when a policy statement issued by an administrative agency is subject to review: The government's position in *Tri-State* and *Texas*—that under the Hobbs Act such review is available only on review of the proceeding in which that policy is announced—and that of the Ninth Circuit herein—that such review must be had when the policy is applied.

Moreover, there is a third alternative—that an administrative policy is subject to review both when it is issued and when it is applied; our position is that this is the correct alternative in those cases in which preenforcement review would be available under *Abbott's* ripeness standards even if there were no question concerning jurisdiction when the policy is applied.[8] This Court has never suggested that preenforcement and postenforcement review are mutually exclusive.

This Court should decide the Hobbs Act issue and put an end to the uncertainty concerning the proper timing of review of administrative policies which are issued after formal rulemaking proceedings.[10] At best, this uncer-

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[8] In the court below, the petitioners argued alternatively that the ICC's policy statement was ripe for review even without regard to the existence of the Hobbs Act problem, and we adhere to that view.

[9] Because of the brevity of the Court of Appeals' opinion, it is uncertain whether that Court meant to preclude review of agency policy statements in all cases.

As a matter of strict logic, there is yet an additional alternative—that in some cases, the interplay of ripeness doctrine and the government's construction of the Hobbs Act would foreclose review on both occasions. However, for the reasons stated earlier, that alternative is inconsistent with *Abbott Laboratories, supra.*

[10] Our position in this regard is entirely consistent with that which we took as one of the respondents in opposing the government's petition in *Tri-State.* We did not there question the importance of the Hobbs Act issue tendered by the United States. Rather, we urged the Court to deny the government's petition for two reasons: 1) Because the government had prevailed on the

tainty gives rise to unnecessary jurisdictional litigation which burdens the Courts of Appeals and the parties. At worst, it is a trap for those who may find themselves foreclosed from any review of the legality of such a policy if, according to the view of ripeness which is reflected in the decision below, they wait until the policy is actually applied, and this Court thereafter sustains the government's Hobbs Act theory.

The issue affects not only decisions of the ICC, but of each of the six agencies that are expressly subject to the Hobbs Act,[11] and, according to the government, "numerous other federal agencies that operate with comparable review provisions".[12]

Lest there be any doubt, we note in conclusion that if certiorari is granted, we will argue that the government's interpretation of the Hobbs Act is wrong, and that the Courts of Appeals have jurisdiction to consider the legality of an agency policy in any case over which they have jurisdiction and the legality of that policy is relevant to the decision of the case. As the Court of Appeals for the Eighth Circuit wrote in *Tri-State*, quoting with approval the views of two other circuits:

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merits below, its petition did not properly invoke this Court's jurisdiction, and 2) because we considered the question raised by the government's petition to be insubstantial. (Brief for Tri-State Motor Transit, Inc., *et al.*, in Opposition, No. 84-1515, pp. 3, 10.) The first of these grounds is not applicable here because the present petitioner is aggrieved by the decision below. As to the second point, we still believe that the government's position under the Hobbs Act is insubstantial, but its very assertion, combined with ripeness doctrine as since construed by the court below, has created a jurisdictional snarl which can be unraveled only by this Court's definitive resolution of the Hobbs Act issue.

[11] The Federal Communications Commission, Nuclear Regulatory Commission and Federal Maritime Commission filed a brief *amici curiae* in the Eighth Circuit supporting the petition for rehearing of the ICC and United States.

[12] Pet. for Certiorari, No. 84-1515, pp. 7-8.

> We agree that [28 U.S.C. § 2344] now precludes an attack on the procedure by which the policy was adopted. However, we hold that the Hobbs Act does not bar judicial review on the substantive validity of the rule [in *Ex Parte MC-156*] even if more than sixty days have elapsed since its issuance. As the District of Columbia and Fifth Circuits have noted, "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Texas v. United States*, 730 F.2d 409, 415 (5th Cir. 1984) (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)). [739 F.2d at 1375, n.2]

The Court of Appeals in this case appears to have been of the same view, although it did not explain its conclusion that petitioners would be able to obtain review of the *Ex Parte 438* policy when it is applied. While rejection of the government's interpretation of the Hobbs Act may result in affirmance of the Court of Appeals' judgment, petitioner would obtain substantial relief because its ultimate right to review of that policy would be vindicated.[13] Since the government presumably will defend

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[13] The situation parallels that in *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). The Court of Claims dismissed a suit brought by the Tribe to obtain compensation from the United States for the loss of rights under a treaty which the Wisconsin Supreme Court had previously held resulted from an Act of Congress. This Court granted the Tribe's petition for certiorari. The Tribe argued that those rights had not been lost, a position which was in the Tribe's long-run interest, although its acceptance would —and in the event did—result in the denial of compensation from the United States and affirmance of the judgment of the Court of Claims. Alternatively, the Tribe asserted that if it failed on the treaty issue, compensation should be awarded, and the judgment of the Court of Claims reversed.

So here. Affirmance on the ground that the Hobbs Act would not foreclose future review of the legality of the ICC's policy would, as stated in the text, give substantial relief to petitioner. Alterna-

the position which it asserted in its petition for certiorari in *Tri-State*, adversarial confrontation on that issue is assured.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE KAUFMANN
(Counsel of Record)
ROBERT J. HIGGINS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Petitioner

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tively, if the Court were to sustain the government's interpretation of the Hobbs Act or, if it were to hold (without resolving that issue) that the Court below erred in dismissing the petition for the reasons stated at pp. 8-11, *supra*, the judgment of the Court of Appeals would be reversed.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-7545

ICC No. 438

AMERICAN TRUCKING ASSOCIATIONS, INC.; FILM, AIR AND PACKAGE CARRIERS ASSOCIATION; INTERSTATE CARRIERS CONFERENCE; NATIONAL TANK TRUCK CARRIERS, INC.,; OILFIELD HAULERS ASSOCIATION; OREGON TRUCKING ASSOCIATION, INC.; REGIONAL AND DISTRIBUTION CARRIERS CONFERENCE; REGULAR COMMON CARRIER CONFERENCE; and SPECIALIZED CARRIERS AND RIGGING ASSOCIATION,

Petitioners,

and

PATRICK W. SIMMONS,

Intervenor,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents,

and

ASSOCIATION OF AMERICAN RAILROADS,

Intervenor.

No. 84-7546

ICC No. 438

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioners,

and

PATRICK W. SIMMONS,
Intervenor,

vs.

INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA,
Respondents,

and

ASSOCIATION OF AMERICAN RAILROADS,
Intervenor.

MEMORANDUM *

Petition to Review Decision of
Interstate Commerce Commission

Argued: June 6, 1985, Seattle, WA

Submitted: July 9, 1985

Before: CHOY, HUG, and BOOCHEVER, Circuit Judges.

Petitioners challenge an Intersate Commerce Commission decision to abandon the practice of allowing railroads to acquire motor carriers only to aid its rail operations in special circumstances, Acquisition of Motor Carriers by Railroads, I.C.C. No. 438 (July 20, 1984).

Petitioners have not shown that the regulation immediately affects their day-to-day affairs. The petition is dismissed because the challenge is not ripe for judicial review. *See Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 164-66 (1967).

DISMISSED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7545

ICC No. 438

AMERICAN TRUCKING ASSOCIATIONS, INC.; FILM, AIR AND PACKAGE CARRIERS ASSOCIATION; INTERSTATE CARRIERS CONFERENCE; NATIONAL TANK TRUCK CARRIERS, INC.,; OILFIELD HAULERS ASSOCIATION; OREGON TRUCKING ASSOCIATION, INC.; REGIONAL AND DISTRIBUTION CARRIERS CONFERENCE; REGULAR COMMON CARRIER CONFERENCE; and SPECIALIZED CARRIERS AND RIGGING ASSOCIATION,

Petitioners,

and

PATRICK W. SIMMONS,

Intervenor,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

and

ASSOCIATION OF AMERICAN RAILROADS,

Intervenor.

No. 84-7546

ICC No. 438

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

and

PATRICK W. SIMMONS,
Intervenor,

vs.

INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA,
Respondents,

and

ASSOCIATION OF AMERICAN RAILROADS,
Intervenor.

ORDER

Before: CHOY, HUG, and BOOCHEVER, Circuit Judges.

The International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America's petition for rehearing, filed August 8, 1985, is denied.

The clerk will file the attached opinion which revises the memorandum disposition filed herein on July 26, 1985.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7545

ICC No. 438

AMERICAN TRUCKING ASSOCIATIONS, INC.; FILM, AIR AND PACKAGE CARRIERS ASSOCIATION; INTERSTATE CARRIERS CONFERENCE; NATIONAL TANK TRUCK CARRIERS, INC.,; OILFIELD HAULERS ASSOCIATION; OREGON TRUCKING ASSOCIATION, INC.; REGIONAL AND DISTRIBUTION CARRIERS CONFERENCE; REGULAR COMMON CARRIER CONFERENCE; and SPECIALIZED CARRIERS AND RIGGING ASSOCIATION,

Petitioners,

and

PATRICK W. SIMMONS,

Intervenor,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents,

and

ASSOCIATION OF AMERICAN RAILROADS,

Intervenor.

No. 84-7546

ICC No. 438

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

and

PATRICK W. SIMMONS,
Intervenor,

vs.

INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA,
Respondents,

and

ASSOCIATION OF AMERICAN RAILROADS,
Intervenor.

Filed July 26, 1985

Petitions for Review of an Order
of the Interstate Commerce Commission

Argued June 6, 1985, Seattle, Washington

Submitted July 9, 1985

Before: CHOY, HUG, and BOOCHEVER, Circuit Judges.

Per Curiam:

Petitioners challenge an Interstate Commerce Commission (I.C.C.) decision to abandon the practice of allowing

railroads to acquire motor carriers only to aid its rail operations in special circumstances, Acquisition of Motor Carriers by Railroads, I.C.C. No. 438 (July 20, 1984).

Petitioners have not shown that the regulation immediately affects their day-to-day affairs. The petition is dismissed because the challenge is not ripe for judicial review. *See Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 164-66 (1967).

Judicial review will be available to challenge an order of the I.C.C. that applies I.C.C. Rule No. 438 to a specific factual situation. *See id.*

DISMISSED.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 438

ACQUISITION OF MOTOR CARRIERS
BY RAILROADS

Decided: July 20, 1984

The Commission is eliminating the requirement that in applications by railroads and rail affiliates pursuant to 49 U.S.C. 11344 (c) to acquire motor carriers whose operations are beyond those auxiliary or supplemental to the rail operations the railroad must demonstrate "special circumstances." Assessment of such acquisitions will be on a case-by-case basis. Changes in the transportation industry and recent revisions to the Interstate Commerce Act encouraging intermodal transportation and competition warrant this change.

DECISION

BY THE COMMISSION:

This proceeding was instituted by a notice of proposed policy statement [48 Fed. Reg. 37,539 (Aug. 18, 1983)]. The notice sought public comment on the continued use of so-called "special circumstances" doctrine in rail and rail-affiliated motor carrier acquisitions of motor carriers. The doctrine reflects a presumption against rail

carrier or rail affiliated motor carrier acquisition of motor carriers. We proposed to eliminate this presumption and adopt a case-by-case consideration of such acquisitions.

Numerous comments were received from shippers, motor carriers, rail carriers, labor representatives, and the United States Department of Transportation (DOT).[1] In general, the railroads and DOT favor the abolition of the doctrine, while shippers, motor carriers, and labor unions oppose any modification of the doctrine. The specific comments of the parties will be addressed at appropriate points throughout our discussion.

An analysis of the "special circumstances" doctrine as it applies to rail and rail affiliated acquisitions of motor carriers requires a review of the statute, the legislative history, and the policies underlying the doctrine.

BACKGROUND

The provision of the Interstate Commerce Act governing rail acquisitions of motor carriers [49 U.S.C. 11344 (c)] [2] states, in pertinent part:

> When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the

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[1] Parties filing comments include the National Association of Wheat Growers; Kenosha Auto Transport Corporation and Dallas and Mavis Forwarding Co.; the Association of American Railroads; Sandersville Railroad Company; National Farmers Union; Ryder System, Inc.; United Transportation Union; American Trucking Associations, Inc. (ATA); and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters). Late comments were filed by the American Bakers Association, which were accepted.

[2] Section 11344(c) was originally enacted as Section 213 of the Motor Carrier Act of 1935, Pub. L. No. 255, ch. 498, § 213(a), 49 Stat. 543, 556 (1935). The Section was recodified as Section 5(2) the Transportation Act of 1940, Pub. L. No. 785, ch. 722, § 7, 54 Stat. 907 (1940), and was subsequently recodified without substantive change in 1978 as 49 U.S.C. 11344(c). Act of October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, 1436 (1978).

> transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use the motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition.

Section 11344(c) was enacted at a time when Congress sought to bring stability to the trucking industry that, at the time, was faced with the economic turmoil of the Great Depression. *See United States v. Drum*, 368 U.S. 370, 374-75 (1962). At that time, railroads made use of motor carrier affiliates primarily in auxiliary or supplemental movements. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 431 (1951).[3] However, the question of the regulation of rail acquisitions of motor carriers apparently did not arise until the last stages of consideration of the Motor Carrier Act of 1935 by the Senate. The predecessor of Section 11344(c) was introduced by Senator Wheeler on the floor of the Senate as a last-minute amendment to the Senate version of the statute. 79 Cong. Rec. 5666 (April 15, 1935). Senator Wheeler explained the effect of his amendment [79 Cong. Rec. 5655 (April 15, 1935)]:

> With this limitation it will be possible for the Commission to allow acquisitions which will make for

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[3] *See Coordination of Motor Transportation*, 182 I.C.C. 263, 336-41 (1932), and *Motor Bus and Motor Truck Operations*, 140 I.C.C. 685, 749 (1928) (both discussing pre-Motor Carrier Act of 1935 rail-truck operations). *See also* S. Doc. No. 152, 73d Cong., 2d Sess. 15, 35 (1932) (Report of the Federal Coordinator of Transportation on the Regulation of Transportation Agencies other than Railroads); H.R. Doc. No. 89, 74th Cong., 1st Sess. 6 (1934) (Report of the Federal Coordinator of Transportation on Transportation Legislation); *Hearings Before the Subcommittee of the Committee on Commerce, United States Senate, on S.3606*, 75th Cong., 3d Sess. 23 (1938) (testimony of Commissioner Eastman regarding rail use of auxiliary motor services).

> coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interests.

Similarly, Representative Sadowski described the purpose of the section in the House of Representatives [79 Cong. Rec. 12,206 (July 31, 1935)]:

> [I]t is the intent, and it is important to the welfare and progress of the motor carrier industry, that the acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation.

The Motor Carrier Act of 1935 and the Transportation Act of 1940 sought to ensure the maximum development of the rail and motor carrier industries as coordinate transportation services. Guiding principles toward this goal were set forth in the Declaration of Policy, Section 202(a) of the Motor Carrier Act of 1935, Pub. L. No. 255, ch. 498, § 202(a), 49 Stat. 543 (1935), which was later incorporated into the National Transportation Policy (NTP) in the Transportation Act of 1940, Pub. L. No. 785, ch. 722, § 1, 54 Stat. 899 (1940).[4] Among those guiding principles was the expressed desire of Congress that the regulation of the surface transportation industries "recognize and preserve the inherent advantages of each mode of transportation." 49 U.S.C. 10101(a)(1).

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[4] Recodified without substantive change as 49 U.S.C. 10101 in the Act of October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, 1337-38 (1978). Subsequently, the NTP has been amended by the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980), and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1913 (1980). The effect of these amendments is discussed *infra*.

The Commission first addressed the question of a rail-motor consolidation in *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101 (1936), *supplemented*, 5 M.C.C. 9 and 49 (1937). Pennsylvania Truck Lines, Inc., a subsidiary of the Pennsylvania Railroad Company, sought control of Barker Motor Freight in order "to establish a coordinated truck-and-rail service," 1 M.C.C. at 105. The "dual form of transportation [was] expected to furnish a more expeditious and economical service." 1 M.C.C. at 105-06. The Commission turned its attention to the rail-motor affiliation issue,[5] noting (1 M.C.C. at 109):

> It is the obvious intent of the act that special safeguards shall surround acquisitions of motor carriers by carriers engaged in other forms of transportation, and no doubt railroads were particularly in mind. The proof in such cases must show, not merely that what is proposed is *consistent* with the public interest, but that it will actively *promote* the public interest and in a particular manner, namely, by enabling the acquiring carrier "to use service by motor vehicle to public advantage in its operations." The proof must show further that the acquisition will not "unduly restrain competition."

The railroad in this proceeding admitted that it would use the motor carrier service in both auxiliary operations and in operations not associated in any way with rail operations. 1 M.C.C. at 111. It also submitted proof that the acquisition would not unduly restrain competition. *Id.* The Commission, however, observed (1 M.C.C. at 111-12):

> [W]e are not convinced that the way to maintain for the future healthful competition between rail and

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[5] At this time, the Commission apparently did not find that the NTP played any role in this issue, for in *Pennsylvania Truck Lines, Inc.—Control—Barker*, there is no mention of that policy.

> truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of [the statute] is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed if it had been under railroad control. . . . [T]he question involved . . . concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.

Thus, the Commission granted the application conditioned on the motor carrier's service being confined to auxiliary and supplemental to rail service. 1 M.C.C. at 113. *See also Pennsylvania Truck Lines, Inc.—Control—Barker, supra*, 5 M.C.C. at 11-12 (supplemental report on auxiliary and supplemental conditions).

Following the Pennsylvania Truck Lines—Barker Motor Freight consolidation, the Commission approved many rail acquisitions of motor auxiliary to and supplemental of the rail carrier's service.[6] Concurrently, the Commission was addressing the question of the effect of this provision on the statute on attempts by rail-affiliated motor carriers to expand their operations through licensing proceedings.[7] It was in this context that the United States

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[6] *E.g., Pacific Motor Trucking Co.—Purchase—Keithly*, 15 M.C.C. 427 (1938); *Texas & P. Motor Transport Co.—Purchase—Southern Transp. Co.*, 5 M.C.C. 653 (1938).

[7] Reading the NTP, Section 11344(c), and the licensing section of the Act, now found at 49 U.S.C. 10922, in the late 1930's, the Commission determined that a rail-affiliated motor carrier would be granted authority to perform operations auxiliarly to and supplemental of the rail service. *Kansas City Southern Transport Co., Common Carrier Application*, 10 M.C.C. 221, 230-39 (1938). The Commission pursued this policy, and also entertained deviations

Supreme Court first was called on to address the validity of the Commission's policies in this area.

In *ICC* v. *Parker*, 326 U.S. 60 (1945), the Court addressed the grant of authority to a rail-affiliated motor carrier. Noting the Commission's administrative discretion "to draw its conclusion from the infinite variety of circumstances which may occur in specific instances." 326 U.S. at 65, the Court reviewed the grant of authority. It observed (326 U.S. at 66) that:

> [w]hen Congress directed that the act should be administered to preserve the inherent advantages of each mode of transportation, it is abundantly clear that it was not intended to bar railroads from the operation of off-the-rail motor vehicles.

As there was no prohibition against granting rail-affiliates motor carrier operating certificates, 326 U.S. at 73, the Court affirmed the grant of authority.

The interpretation of Section 11344(c), as recodified by the Transportation Act of 1940, was addresesd by the Commission in *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457 (1946), *supplemented*, 55 M.C.C. 567 (1949).[8] The Commission drew upon the NTP and Section 11344(c) (40 M.C.C. at 460-65) to conclude (40 M.C.C. at 473):

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from the policy where unrestricted operations by rail-owned motor carriers are found on the specific facts and circumstances to be in the public interest—the so-called "special circumstances doctrine." *Rock Island Motor Transit Co., Common Carrier Application*, 63 M.C.C. 91, 102, 108 (1956), *aff'd sub nom. American Trucking Associations* v. *United States*, 355 U.S. 141 (1957). The Commission has subsequently abolished this past policy practice in Ex Parte No. MC-156, *Motor Carrier Operating Authority-Railroads*, 132 M.C.C. 978 (1982), *aff'd sub nom. American Trucking Associations, Inc.* v. *ICC*, 722 F.2d 1243 (5th Cir. 1984), *pet. for cert. filed*, No. 83-2117 (June 22, 1984).

[8] *Aff'd sub nom. United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951).

> that the preservation of the inherent advantages of motor carrier service and of healthy competition between railroads and motor carriers and the promotion of economical and efficient transportation service by all modes of transportation and of sound conditions in transportation and among the several carriers, in short the accomplishment of the purposes forming the national transportation policy, require that, except where unusual circumstances prevail, every grant to a railroad or to a railroad affiliate to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

The Commission concluded (40 M.C.C. at 475; 55 M.C.C. at 582) that in the circumstances of the case before it the railroad would use the motor carrier "to public advantage in its *rail operations.* [emphasis in original]." Thus, the Commission added the word "rail" to the statute that had only provided that the rail carrier use the to-be-acquired motor carrier "to public advantage in its operations." *See* 49 U.S.C. 11344(c).

The Supreme Court has only once opined on the validity of a Commission order involving the acquistion of a motor carrier by a railroad. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). The Court noted that it was Commission practice from the beginning of motor carrier regulation to restrict the operations of railroad motor carrier affiliates, 340 U.S. at 430, and viewed this practice as "a logical method to insure the maximum development of the two transportation agencies—rails and motors," 340 U.S. at 431. The Court continued (340 U.S. at 431-33):

> Railroad operation as motor carriers are forbidden by [Section 11344(c)] except to enable a railroad

> 'to use service by motor vehicle to public advantage in its operations.' (citing in a footnote *Hearings Before Subcommittee of the Committee on Interstate Commerce, on S. 3606*, 75th Cong., 3d Sess. 23 (1938)].
>
> . . . Congress reenacted § 213 of the Motor Carrier Act in § 5(2) of the Transportation Act of 1940. Such limitation was in furtherance of the National Transportation Policy, for otherwise the resources of railroads might soon make over-the-road truck competition impossible, as unregulated truck transport, it was feared, might have crippled some railroads. Motor transportation then would be an adjunct to rail transportation, and hoped-for advancements in land transportation from supervised competition between motors and rails would not materialize. The control of the bulk of rail and motor transportation would be concentrated in one type of operation. Complete rail domination was not envisaged as a way to preserve the inherent advantages of each form of transportation. [footnote omitted].

The Court went on to affirm the Commission's modification of the auxiliary and supplemental conditions that had been imposed on the acquisition. 340 U.S. at 444.

The Supreme Court has had the opportunity to address rail-motor modifications in the context of applications for operating authority on two occasions. *American Trucking Associations* v. *United States*, 355 U.S. 141 (1957); *American Trucking Associations* v. *United States*, 364 U.S. 1 (1960). Both of those cases involved an assessment of the Commission's policy of reading the restrictive language of Section 11344(c) in conjunction with the NTP and the licensing provisions. Indeed, the United States Court of Appeals for the Fifth Circuit has recently recognized that the interpretations of these sections are merely Commission policy, see *American Truck-*

ing Associations, Inc. v. *ICC*, 682 F.2d 487, 490 (5th Cir. 1982), and *American Trucking Associations, Inc.* v. *ICC, supra*, 722 F.2d at 1249.

In Ex Parte No. MC-156, *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (1982), we addressed the question of the continuing viabilty of our policies surrounding the licensing of rail-affiliated motor carriers, and concluded (132 M.C.C. at 981) that "[t]he 'special circumstances' doctrine and its underlying policies are incompatible with the regulatory scheme now mandated by Congress under the revised Interstate Commerce Act." This conclusion was based on many factors, including (1) the 1980 revisions to the Interstate Commerce Act, (2) the changed economic positions of the rail and motor industries, (3) the emphasis on intermodal and coordinated transportation operations, and (4) our revised view concerning the best way to "recognize and preserve the inherent advantages" of each mode of transportation. The United States Court of Appeals has recently affirmed this modification of past policy, *American Trucking Associations, Inc.* v. *ICC, supra*, 722 F.2d 1243, as it affects licensing proceedings. The court specifically reserved (722 F.2d at 1251) the question before us today, *i.e.*, whether 11344(c) still requires the retention of the special circumstances doctrine in acquisition proceedings. For the reasons discussed below, we conclude that Section 11344(c) must be reinterpreted in light of the changes in the statute and the economic conditions of the industries.

PRELIMINARY MATTER

The ATA argues in its comments that the proposed policy statement is in fact a rule that leaves no discretion to the Commission in disposing of rail acquistions of motor carriers. This argument need not detain us long, for the policy we adopt here precisely meets the well-

established test for determining whether an agency action in a policy statement or a rule.[9]

The key inquiry in determining whether a particular agency action announces a rule or a general policy statement is the extent to which the challenged policy leaves the agency free to exercise its discretion in an individual case, or, on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. *Ryder Truck Lines, Inc.* v. *United States*, 716 F.2d 1369 1377 (11th Cir. 1983), *cert. denied*, —— U.S. —— (1984); *Regular Common Carrier Conference* v. *United States*, 628 F.2d 248, 250-51 (D.C. Cir. 1980); *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 701 (5th Cir. 1979). Our action in this proceeding actually gives the agency *more* discretion than previously existed in the Commission's prior interpretation of Section 11344 (c). Previously, a railroad acquiring a motor carrier was required to demonstrate "special circumstances" in order to obtain unrestricted motor carrier operating rights in the consolidation. Otherwise, the Commission automatically imposed the standard "auxiliary to or supplemental of" restriction. Under our policy statement, this will no longer be the case. We will examine each application under 49 U.S.C. 11344(c) individually to determine whether the proposed transaction is in compliance with the statutory standards.

While below we enunciate the type of showing that an applicant under Section 11344(c) will have to make, this showing will "direct the analysis but not necessarily the

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[9] We note that we have conducted this proceeding as a notice and comment proceeding, in full compliance with the requirements of the Administrative Procedure Act, 5 U.S.C. 553. Thus, the question of whether this is a policy statement or a rule will only affect the standard of judicial review. *Ryder Truck Lines, Inc.* v. *United States*, 716 F.2d 1369, 1377 (11th Cir. 1983), *cert. denied*, —— U.S. —— (1984).

answer." *Ryder Truck Lines, Inc.* v. *United States, supra*, 716 F.2d at 1377. Thus, like our policy statement in *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 758 (1982), which was affirmed in *Ryder Truck Lines*, this policy statement will not be determinative of applications under 49 U.S.S. 11344(c), and we remain free to deny or condition proposed consolidations of railroads and motor carriers as the circumstances of the case we are considering warrant.[10] *See also Regular Common Carrier Conference* v. *United States, supra.*

DISCUSSION

After analysis of the statute, its legislative history, prior Commission and judicial interpretation of the statute, recent statutory changes, changes in the economics of the rail and motor industries, and the comments of interested parties, we conclude that the "special circumstances" doctrine should be eliminated as a presumption where a railroad or rail-affiliate seeks to acquire a motor

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[10] The ATA also argues that our policy statement has already been implemented (and therefore is retroactive contrary to the nature of a true policy statement), citing Finance Docket No. 30221, *Burlington Northern, Inc.—Control Exemption—Federal Transport, Inc.* This argument is without merit. Finance Docket No. 30221 involved an exemption proceeding under 49 U.S.C. 10505, and fully analyzed the propriety of the application under the relevant statutes. To the extent that the decision in that case reflects the Commission's position in this proceeding, it is in a posture similar to that of the Pacific Motor Trucking application in Docket No. MC-78786 (Sub No. 281)F, *Pacific Motor Trucking Company, Ext.—Nationwide General Commodities,* which granted applicant unrestricted operating authority prior to the decision in *Applications for Operating Authority—Railroads, supra,* 132 M.C.C. 978, but nonetheless was affirmed by the Fifth Circuit in light of the policy statement, *see American Trucking Associations, Inc.* v. *ICC, supra,* 722 F.2d at 1244. Of course, the main difference between the *Pacific Motor Trucking* proceeding and the decision in Finance Docket No. 30221 is that no one sought review of our decision in Finance Docket No. 30221.

carrier. Instead, we shall examine applications under 49 U.S.C. 11344(c) on an individual, case-by-case basis.

Statutory Authority

Initially, we note that several of the parties suggest that our past interpretations of the statute cannot now be modified. We reject this argument, for, as the Supreme Court stated in *American Trucking Associations* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967):

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretations and overturn past administrative rulings and practices. . . . Regulatory agencies do not establish rules of conduct to last foreover; they are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

The "special circumstances" doctrine, whether it arises in the context of an acquistion proceeding or a licensing proceeding, was an agency policy "created and transformed by the agency itself," *American Trucking Associations, Inc.* v. *ICC*, 682 F.2d 487, 492 (5th Cir. 1982); *American Trucking Associations, Inc.* v *ICC*, *supra*, 722 F.2d at 1249. *See also United States* v. *Rock Island Motor Transit Co.*, *supra*, 340 U.S. at 430-31 (Commission "practice" regarding rail-motor relations).

Some parties also argue that the proposed action here is foreclosed by prior Supreme Court cases affirming the Commission's past interpretations of the "special circumstances" doctrine. We addressed this argument in *Applications—Operating Authority—Railroads*, *supra*, 132

M.C.C. at 984, where we observed that prior Supreme Court decisions were reached under statutes that were radically different from the Interstate Commerce Act of today, and that even under the old statute the Commission was permitted to depart from the doctrine as there was no absolute statutory prohibition against permitting railroads to acquire motor carriers. The Fifth Circuit affirmed this view of the past Supreme Court decisions when, in *American Trucking Associations, Inc.* v. *ICC, supra*, 722 F.2d at 1249, it observed that the Supreme Court was approving the Commission's interpretation of the Interstate Commerce Act.

Indeed, a reading of the one Supreme Court case addressing rail acquistions of motor carriers, *United States* v. *Rock Island Motor Transit Co., supra*, 340 U.S. at 430-31, confirms that the Court was addressing Commission "practice." *Accord, American Trucking Association, Inc.* v. *United States, supra*, 355 U.S. at 147-48 ("We specifically approved this long administrative practice in *United States* v. *Rock Island Motor Transit Co., supra.*"); *American Trucking Associations* v. *United States, supra*, 364 U.S. at 6-7 ("[T]his Court has confirmed the correctness of the Commission's conception of its responsibilities" in light of the Interstate Commerce Act as a whole.).

Finally, the argument that a regulatory agency may not change its interpretation of a statute it administers in light of experience or subsequent developments in the industries it is charged with regulating absent a change in the statute itself simply because a prior interpretation has been affirmed by the courts suggests that there can be only one correct interpretation of the statuory provision involved. Such a suggestion is not only antithetical to the sort of regulatory flexibility that the Supreme Court sought to encourage in the *ATA* v. *Atchison, T. & S.F.* decision, the most relevant portion of which is quoted above, but also is contradicted by the inumerable

cases imposing upon the courts the obligation to affirm reasonable agency interpretations of their governing statutes even if the interpretation of the agency is not the one preferred by the reviewing court. The courts have consistently rejected such suggestions, the most recent example being *Western Coal Traffic League* v. *United States*, 719 F.2d 772, 778 (5th Cir. 1983) (*en banc*).

We do not agree that Congress affirmed the special circumstances doctrine when, in enacting the Motor Carrier Act of 1980 and the Staggers Rail Act of 1980, it did not amend either Section 10101 (the NTP) regarding "inherent advantages" or Section 11344(c). The Fifth Circuit rejected precisely this argument in *American Trucking Associations, Inc.* v. *ICC*, *supra*, 722 F.2d at 1249 n.3, where it observed that Congress must not only be aware of the agency's interpretation but must also give some affirmative indication of its intent to preclude an agency change in interpretation. The court failed to find such an indication in the 1980 legislative history and therefore refused to apply the "doctrine" of reenactment." [11]

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[11] Parties stress that the special circumstances doctrine was brought before Congress in its consideration of the Staggers Act, citing *Railroad Deregulation Act of 1979: Hearings on S.796 Before the Senate Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 221, 223-24 (part I, 1979) (Statement of Walter G. Treanor, Western Pacific Railroad). However, this fleeting reference to the doctrine among the volumes of testimony and lengthy reports and debates on the Staggers Act and the Motor Carrier Act of 1980 are not sufficient to indicate that Congress affirmatively intended to preclude any change in the policy. Indeed, the Teamsters suggest (Comments, at 7-8) that no legislator advocated a change in the doctrine. Just as valid a point might be that no legislator suggested that the Commission was precluded from changing the doctrine.

This situation differs markedly from the situation addressed by the Supreme Court in *United States* v. *Rock Island Motor Transit Co.*, *supra*, 340 U.S. at 432. There, the Court noted that Section

Several parties suggest that certain sections of the Interstate Commerce Act—49 U.S.C. 10505(g), 10322(b)(2), 11344(e), and 10505(f)—indicate that Congress intended to preclude any change in the special circumstances doctrine. We note that many of these arguments have been presented to the Commission and to the courts in another context (licensing of rail affiliated motor carriers) and have been rejected. *See Motor Carrier Operating Authority—Railroads, supra*, 132 M.C.C. at 985, and *American Trucking Associations, Inc.* v. *ICC, supra*, 722

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213 of the Motor Carrier Act of 1935, which contains the language now found in Section 1134(c), was reenacted by Congress as part of Section 5(2) in the Transportation Act of 1940 (see footnote 2, *supra*). However, in that circumstance, Congress was aware of the Commission's interpretations of the statute (*see* 340 U.S. at 432 and n. 10) that were specifically called to its attention. No such circumstances were in effect in the congressional consideration of the Motor Carrier Act of 1980 and the Staggers Act.

One party suggests that because we recognized in the past that any modification of the doctrine would have to come from Congress, we cannot do it ourselves now. To the extent that the Commission has looked to congressional action before re-examining the doctrine, the agency has waited until modification of the statute "as a whole" occurred. Therefore, the legislative amendments supporting the Commission's action have taken place. Second, the contention by certain parties that we have recognized after the 1980 legislation that congressional action is necessary to modify the doctrine is simply incorrect. The Teamsters cite our statements in Ex Parte No. 55 (Sub No. 53), *Motor Carrier Consolidation Procedures*, 46 Fed. Reg. 51,413, 51,414 (Oct. 20, 1981). However, they fail to note that we specifically rejected this construction when we adopted the *final* policy version of Ex Parte No. 55 (Sub No. 53), *Motor Carrier Consolidation Procedures*, 127 M.C.C. 788 (1982).

Moreover, even if the Teamsters' argument were accepted *arguendo*, it would not foreclose the result we arrive at today because it is well settled that an agency does not lose jurisdiction it possesses because of failure to exercise it or mistaken notions as to its extent. *National Petroleum Refines Ass'n.* v. *FTC* 482 F.2d 672, 793-96 (D.C. Cir. 1973) and cases cited therein. *See also Commonwealth of Pennsylvania* v. *ICC*, 561 F.2d 278, 286-87 (D.C. Cir. 1977).

F.2d at 1251-52. Here, we address their arguments in light of Section 11344(c) only.

Section 10505(g) does not require the continuation of the "special circumstances" doctrine. That section [12] solely involves the the exemption of rail carrier transportation. Here, as in *Motor Carier Operating Authority—Railroads*, *supra*, 132 M.C.C. at 985-86, we are not exempting anything, and therefore that section is not relevant to the inquiry before us. The courts have approved this construction of Section 10505(g) in the context of the licensing of rail-affiliated motor carriers, *American Trucking Associations, Inc.* v. *ICC*, *supra*, 722 F.2d at 1251. Second, to the extent that Section 10505(g) can be read to evince some broader congressional policy precluding intermodal ownership, such a policy can exist only to the extent "otherwise prohibited by [the Interstate Commerce Act]." It is well-established that Section 11344(c) did not require the imposition of auxiliary and supplemental restrictions. *See, e.g., American Trucking Associations, Inc.* v. *United States*, 425 F.Supp. 903, 907 (D.D.C. 1975), *aff'd* 425 U.S. 955 (1976); *Canadian National Transportation, Ltd.—Investigation of Control*, 109 M.C.C. 392 (1970); *Burlington Truck Lines, Inc.—Purchase—Pirnie*, 85 M.C.C. 363, 365-66 (1960); *Rio Grande Motor Way, Inc.—Control and Merger*, 87 M.C.C. 479, 483 (1961). The Supreme Court has recognized that Section 11344(c) was not designed to bar the operation of off-the-rail motor vehicles. *ICC* v. *Parker*, *supra*, 326 U.S. at 66. As the Fifth Circuit recently observed (*American Trucking Ass'ns, Inc.* v. *ICC*, *supra*, 722 F.2d at 1250):

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[12] 49 U.S.C. 10505(g) provides:

> The Commission may not exercise its authority under this section [granting the Commission authority to exempt rail carrier transportation from regulation in certain instances] (1) to authorize intermodal ownership that is otherwise prohibited by this title . . .

> [E]ven under the old protective regulatory scheme there was no automatic per se exclusion of railroads from unrestricted trucking operations.

Indeed, where the acquiring railroad or rail affiliate already held unrestricted authority [*Burlington Truck Lines, Inc.—Purchase—Love*, 75 M.C.C. 258 and 603 (1958)], or where the application was unopposed [*Burlington Truck Lines, Inc.—Purchase—Pirnia*, *supra*; *McCloud River Trucking Co.-Purchase—Zamboni*, 101 M.C.C. 131, 135-356 (1966)] unrestricted authority was often granted in an acquisition proceeding. Thus, we conclude that Section 10505(g) does not bar our action here, which is consistent with the Interstate Commerce Act "as a whole."

Nor is it correct to assert that 49 U.S.C. 11344(e)[13] somehow precludes our action here. The Fifth Circuit described the purpose of that section in *American Trucking Associations, Inc.* v. *ICC*, *supra*, 722 F.2d at 1252, as not being a "pervasive prohibition" of approval of rail

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[13] 49 U.S.C. 11344(e) provides:

> (e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the fail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which were not protested by interested parties within 30 days following receipt of such application.

acquisitions of motor carriers. The court recognized that the Commission still has regulatory discretion even in light of Section 1134(a). Moreover, it is clear that Congress did not have the "special circumstances" doctrine in mind when it enacted Section 11344(e). That section arose as a floor amendment in the Senate to the Staggers Act, and was described as "intended to deal with emergency-type situations where there is a serious failure of service by a particular railroad." 126 Cong. Rec. S3289 (Apr. 1, 1980) (remarks of Senators McGovern and Cannon).

Section 10322(b)(2)[14] does not prevent our action here. That subsection was merely a reflection of the elimination of the TOFC exemption, *see* 126 Cong. Rec. S3634-36 Apr. 15, 1980), and Congress' desire that TOFC applications receive expedited treatment by the Commission. The Fifth Circuit agrees with our limited reading of that section. *American Trucking Associations, Inc.* v. *ICC*, *supra*, 722 F.2d at 1252; *see also American Trucking Associations, Inc.* v *ICC*, 656 F.2d 1115, 1122 (5th Cir. 1981).

Finally, Section 10505(f)[15] does not in any way affect adversely our action here. That section simply "singles out continuous intermodal movement as an appropriate candidate for the exercise of the Commission's section 10505(a) exemption authority." *American Trucking As-*

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[14] 49 U.S.C. 10322(b)(2) provides:

> In any case involving an application for authority to provide motor carrier transportation incidental to trailer-on-flatcar or container-on-flatcar service by rail under sub-chapter II of chapter 109 of this subtitle, a final decision on such application shall be issued in writing not later than the 180th day following the date such application is filed with the Commission.

[15] 49 U.S.C. 10505(f) provides:

> The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

sociations, Inc. v. *ICC*, *supra*, 656 F.2d at 1120-21. The Commission exercised this authority in *Improvements of TOFC-COFC Regulation*, 364 I.C.C. (1981), with the approval of the court in the above-cited decision. This does not bear directly on our action here.

In summary, there is not even a scintilla of evidence that Congress intended to preclude the Commission from re-examining the decades old "special circumstances" doctrine in rail acquisitions of motor carriers when it enacted the Motor Carrier Act of 1980 or the Staggers Act.

The Requirements of the Statute

Section 11344(c) requires that in applications for rail acquisitions of motor carriers we find (in addition to the required findings of 49 U.S.C. 11344(d) that govern such acquisitions) that the proposal (1) is consistent with the public interest; (2) will enable the rail carrier to use the motor carrier transportation to public advantage in its operations; and (3) will not unreasonably restrain competition. As discussed above, the Commission has in the past applied a presumptive policy against rail acquisitions of motor carriers. We no longer find this approach appropriate and instead for the future will pursue a more balanced, case-by-case approach to our analysis under Section 11344(c).[16]

We regard Section 11344(c) as establishing certain burdens on both applicants and protestants. An applicant must still establish that its proposal will not restrain competition, that it will use the motor carrier in its operations to public advantage, and that the acquisition

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[16] Of course, as we have previously announced in *Motor Carrier Consolidation Procedures*, 127 M.C.C. 788 (1982), the competition analysis of 49 U.S.C. 11344(d) and the public interest standard of 49 U.S.C. 11344(c) will be applied to consolidations involving motor carriers of property. This policy statement does not change that prior pronouncement. Here, we only address the standards under Section 11344(c).

is consistent with the public interest. In the past, however, an applicant also had to demonstrate that there were "special circumstances" that warranted deviations from the Commission practice of limiting the motor carrier authority to be obtained in the acquisition to supplemental and auxiliary operations. Such a showing by an applicant is no longer necessary.

An applicant was required to make such a demonstration because, in the past, the Commission had interpreted the words "in its operations" to mean "in its *rail* operations." *See, e.g., United States* v. *Rock Island Motor Transit Co., supra,* 340 U.S. at 431; *Rock Island Motor Transit Co.—Purchase—White Line Motor Freight, supra,* 55 M.C.C. at 582. *See also American Trucking Associations, Inc.* v. *ICC, supra,* 722 F.2d at 1246 (motor carriers acquired by railroads were to be used in rail-related activities). This reading of the statute is no longer valid in light of (1) the dramatic change in emphasis of the Interstate Commerce Act as recently amended by Congress (a) to emphasize competition and deemphasize regulation wherever possible and (b) to emphasize intermodalism, and (2) the changed economic circumstances of the industries, particularly the motor carrier industry. We will interpret the phrase "in its operations" to refer to the overall transportation activities of the carrier seeking to acquire the motor carrier.

Our interpretation of the statute also will ensure that the inherent advantages of each mode of transportation are preserved. See 49 U.S.C. 10101(a)(1)(A). The agency's previous interpretation of Section 11344(c) rested in part on the conclusion that the NTP's inherent advantages clause would be furthered by restricting rail-affiliated motor carriers to auxiliary and supplemental service. As discussed *supra,* this interpretation was arrived at when the focus of regulation was to limit competition to achieve stability within the trucking industry. However, the Interstate Commerce Act, as amended by the 1980 legislation, contains a new, strongly pro-competi-

tive thrust, which is incompatible with the special circumstances doctrine. In *Motor Carrier Operating Authority —Railroads, supra*, we observed that the inherent advantages of each mode of transportation would be sharpened by the elimination of the doctrine. This is true in acquisition proceedings, too. The courts have affirmed that a change in our approach to our role in furthering the objectives of the national transportation policy with respect to the rail and motor modes of transportation is certainly permissible in light of the legislative and economic changes facing those industries. *American Trucking Associations, Inc.* v. *ICC, supra*, 722 F.2d at 1248-51. Moreover, we note that the Supreme Court has recognized that the inherent advantages clause of the NTP "was not intended to bar railroads from the operations of off-the-rail motor vehicles." *ICC* v. *Parker, supra*, 326 U.S. at 66.

This approach to Section 11344(c) does not, as one party contends, "vitiate" the statute. First, a railroad or rail affiliate seeking to acquire a motor carrier must meet the "public interest" requirements embodied in Section 11344(c). Our action here does not relieve any carrier from such a requirement. Second, the question of whether the proposed acquisition is to be used "to the public advantage in its operations" is still an issue in any application. Thus, an applicant would still have to demonstrate that the proposed acquision meets the more stringent statutory requirements imposed on rail-motor consolidations by statute. Lastly, the question of whether the proposal will unreasonably restrain competition must still be addressed in any proceeding.

All we do here is announce that we will not routinely impose supplemental and auxiliary conditions upon motor carriers acquired by railroads or rail affiliated motor carriers absent a showing of special circumstances but rather will decide whether to impose such conditions based upon the facts of each individual case.

In sum, the statute does not require a railroad or a rail-affiliated applicant seeking to acquire a motor carrier to demonstrate "special circumstances" in order to obtain unrestricted motor carrier operating authority. Such an applicant need only demonstrate that the proposal is consistent with the public interest, will be used to public advantage in its overall transportation operations, and will not unduly restrain competition. We now turn to both the statutory and economic bases for our revised interpretation.

The Interstate Commerce Act
"As A Whole" Does Not Require Continuation
Of The Special Circumstances Doctrine

The Supreme Court has advised that in interpreting the Interstate Commerce Act, we must view the act "as a whole." *American Trucking Associations* v. *United States*, *supra*, 355 U.S. at 152. We conclude that the revisions to the Act in 1980 have so amended the statute that, viewed as a whole, the special circumstances doctrine no longer has a role to play in the acquisitions of motor carriers by railroads.

First, Congress has shown a new and increased concern that competition be considered in such acquisitions. In *Motor Carrier Consolidation Procedures*, *supra*, 127 M.C.C. 788, we discussed how we would apply Section 11344(d) in assessing consolidations among motor carriers of property. Section 11344(d) makes the relevant inquiries in motor carriers of property combinations whether:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.[17]

Thus, the relevant inquiry in acquisition proceedings involving railroads and motor carriers is the competitive impact of the proposal. Section 11344(d) was enacted as part of the Staggers Act, Pub. L. No. 96-448, § 228(b), 94 Stat. 1895, 1931 (1980). Congress recognized that this section would require that we "balance the transportation benefits of the transaction against the anticompetitive effects." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 120 (1980). This is precisely the approach that we adopt here.

The Staggers Act also evinced Congress' concern that competition play a new, more important role in our deliberations by enacting the new Rail Transportation Policy, codified at 49 U.S.C. 10101a. Pub. L. No. 96-448, § 101, 94 Stat. 1895, 1897-98 (1980). The Rail NTP requires that we implement as a policy of the Federal government "effective competition and coordination between rail carriers and other modes," 49 U.S.C. 10101a (5), the "reduc[tion of] regulatory barriers to entry and exit from the industry," 49 U.S.C. 10101a(7).

Similarly, the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) encouraged the introduction of competition into the motor carrier industry. Congress viewed the 1980 legislation as establishing a "new Federal policy which is designed to promote a competitive and efficient motor carrier industry." H.R. Rep. No. 96-1096, 96th Cong., 2d Sess. 14(1980). At the heart of this legislation is the mandate for eased regulatory entry requirements offering "increased opportunities for new

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[17] Section 11344(d) applies to all transactions subject to Commission jurisdiction under 49 U.S.C. 11343 that do not involve motor carriers of passengers and merger or control of at least two class I railroads.

carriers to get into the trucking business," *id.* at 3. Indeed, embodied in the congressional findings section of the 1980 Motor Carrier Act is Congress' concern that:

> the statutes governing Federal regulation of the motor carrier industry are outmoded and must be revised to reflect the transportation needs and realities of the 1980's; that historically the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for . . . others to enter the trucking industry . . .

Pub. L. No. 96-296, § 3(a), 94 Stat. 793 (1980), *reprinted in* 49 U.S.C. 10101 Historical and Revision Notes.

Congressional emphasis on competition vitiates our prior interpretations of what the statute demands in considering rail acquisitions of motor carriers. No longer do we think that the best method of preserving the inherent advantages of each mode is through the artificial separation of the modes as enforced through the auxiliary and supplemental restrictions and the restrictive application of the special circumstances doctrine. We recognize that in 1935 when the language of Section 11344(c) was enacted the concerns centered around the perceived threat of invasion of the nascent trucking industry by the railroads. However, the competitive concerns that gave rise to our prior interpretations of this section can be better addressed through analysis of whether the proposed acquisition is in the public interest and will enable the rail carrier to use motor carrier transportation to public advantage [49 U.S.C. 11344(c)], and the competitive impact analysis required of such consolidations [49 U.S.C. 13344(c)(4)]. Thus, by approaching the question of the impact of a rail acquisition of a motor carrier through the mechanisms of the competitive analysis mandated by Sections 11344(c) and (d), we will be able to better

balance the public interest in permitting the proposed acquisition, the requirement that we preserve the inherent advantages of each of the modes of transportation, and any possible anticompetitive effects.[18]

In addition, this reading of the statute is permitted, if not compelled by Congress' emphasis on intermodal and coordinated transportation services. For example, the guiding light of our administration of the Interstate Commerce Act is the NTP. The NTP stress the importance of intermodal activities. *See* 49 U.S.C. 10101(a)(2)(I). *See also* 49 U.S.C. 10101(5) (Rail NTP stating that it is the policy of the government to ensure "effective competition and coordination between rail carriers and other modes."). Moreover, 49 U.S.C. 10505(f) contains Congress' further expression that rail-motor competition and coordination are to be stressed by the Commission in regulating the surface transportation industries. In *Motor Carrier Operating Authority—Railroads, supra,* 132 M.C.C. at 988-89, we discussed the chilling effect the special circumstances doctrine has had on the development of intermodal operations. *See also American Trucking Associations, Inc.* v. *ICC, supra,* 722 F.2d at 1251. Our interpretation of the phrase "in its operations" as covering a carrier's overall transportation operations both recognizes the current true nature of surface transportation as a coordinated, intermodal operation, and removes the chilling effect that the doctrine has had on the industry for the past 50 years.

Intermodal operations and the operation of integrated transportation entities, rather than solely "rail carriers" or "motor carriers," are conducive to handling the transportation of commodities in the most efficient manner.

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[18] Here as in considering mergers and consolidations of Class I railroads and applicants for new or additional authority to enter the motor carrier field our emphasises will be on harm to competition and not individual competitors.

Viewing the phrase "in its operations" as indicating that the relevant product market is transportation in general rather than rail transportation is more consistent with the Interstate Commerce Act of today "as a whole." An integrated transportation entity can take into account the length of the haul, the character of the goods, various cost efficiencies, and demand and supply levels to determine whether rail or motor transportation will best serve the shipping public. The ability of a transportation company to provide the consumer with this broad range of choices is certainly consistent with the aim of the Interstate Commerce Act to ensure that the best possible surface transportation system is provided to the public. It is also consistent with the approach taken by the Supreme Court as long ago as 1967 in approving our TOFC regulations in *American Trucking Ass'ns* v. *Atchison T.S.F. Ry. Co., supra.*

The Relative Economic Positions of the Railroad And Trucking Industries Have Changed

In our proposed policy statement, we noted that the relative economic positions of the rail and trucking industries have changed dramatically since the enactment of the Motor Carrier Act of 1935, and that these changed circumstances warrant modification of our approach to the special circumstances doctrine in acquisition proceedings. Several parties challenge this assessment. However, we conclude that the circumstances of 1935 differ so greatly from those of the 1980's that our changed policy is warranted.

That Congress recognized that the changed circumstances of the two industries is beyond question. In *American Trucking Associations, Inc.* v. *ICC, supra,* 722 F.2d at 1251, the court observed:

> Congress has recognized the change in the relative economic positions of the rail and trucking indus-

> tries. For example, one House Report notes that the earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds necessary for capital improvements. See Report of the Committee on Conference on S. 1946, Staggers Rail Act of 1980, H.R. Rep. No. 1430, 96th Cong., 2d Sess. 79 (1980).

Congressional findings of the Motor Carrier Act and the Staggers Act confirm this conclusion. *See* Staggers Act, Pub. L. No. 96-448, §§ 2(5)-(9), 94 Stat. 1896-97 (reflecting the low market shares of the railroads, low earnings, capital shortfalls, and possible future deterioration of the rails), and Motor Carrier Act of 1980, Pub. L. No. 96-296, § 3(a), 94 Stat. 793 (indicating that the Motor Carrier Act was designed to meet the realities of the 1980's and of a mature motor carrier industry.) *See also Motor Carrier Operating Authority—Railroads, supra,* 132 M.C.C. at 982.

Several parties submit industry statistics from the past year, alleging that they demonstrate that the congressional findings in the 1980 legislation are no longer valid. These arguments are largely irrelevant to our determination here.[19] The motor carrier industry has in the last few years been exposed to the fresh air of competition and is only now beginning to adjust to that environment. It is to be expected that some shake up in

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[19] The Teamsters and the ATA argue that the congressional findings of 1980 are outdated and no longer valid as an economic base for our analysis. We previously rejected this argument, *Motor Carrier Operating Authority-Railroads, supra,* 132 M.C.C. at 982, and the court has deferred to us on this issue. *American Trucking Ass'ns, Inc.* v. *ICC, supra,* 722 F.2d at 1252. Somewhat inconsistently parties argue that we should retain the special circumstances doctrine that was based on the economic conditions of 1935 at the height- of the Great Depression. Certainly, if the 1980 congressional findings are outdated, so are the economic conditions which prompted the statute in 1935.

the industry will occur. This has been perhaps compounded by difficulties the economy encountered. Nonetheless, the motor carrier industry has shown a remarkable resilience. As we observed in Ex Parte No. MC-166, *Pricing Practices of Motor Common Carriers of Property Since the Motor Carrier Act of 1980* (not printed), served August 26, 1983, some 7,000 new motor carriers have come into existence since the Motor Carrier Act of 1980 was enacted. This compares to the estimated 230 motor carriers that have gone into bankruptcy during that time.

The ATA argues that almost all rail-owned motor carriers are subsidized by the rail owners, and that independent motor carriers therefore operate at a disadvantage. This statement would be true of any motor carrier that operates at a loss and is owned by a large conglomerate. In any event, we have already rejected the proposition that such motor carriers can engage in anticompetitive actions such as predatory pricing. *See Cost Standards for Railroads Rates*, 362 I.C.C. 800, 825 (1980).

Certain parties commenting on economic positions of the industries fear that the railroads will be able to dominate the motor carrier industry. This fear is unfounded. The protections of Section 11344(c) are still present to prevent the domination of one segment of the transportation industry by another. We will continue to make findings under that section. Our action here does not eliminate that section from the Interstate Commerce Act. As we observed in the proposed policy statement, "applicants and protestants will continue under our proposed policy to have the opportunity to present arguments under these issues concerning the requirement that approval result in public advantage and no unreasonable restraint of competition." Our examination of any proposed rail-motor carrier acquisition will take this industry fear into account if it is raised by the parties and our conclusions in individual cases will of course be subject to review by the courts.

REGULATORY FLEXIBILITY ANALYSIS

We certified in the notice of proposed policy statement that this change in policy will not have a significant economic impact on a substantial number of small entities because we are substituting a case-by-case analysis in lieu of a presumption.

ENERGY AND ENVIRONMENTAL CONSIDERATIONS

This action does not significantly affect either the quality of the human environment or energy conservation.

Authority: This policy statement is issued pursuant to 49 U.S.C. 10101, 10101a, 10321, 10326, and 11344 and 5 U.S.C. 553.

Index: The subjects involved in this policy statement are:

Railroads

Motor Carriers

Intermodal Transportation

This decision shall become effective on August 29, 1984.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison.

JAMES H. BAYNE
Secretary

[SEAL]

APPENDIX D

The Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* provides in pertinent part as follows:

> § 704. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The Administrative Orders Review Act (Hobbs Act) 28 U.S.C. § 2341, *et seq.*, provides in pertinent part as follows:

> § 2342. The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> > (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
> >
> > (2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;
> >
> > (3) such final orders of the Federal Maritime Commission or the Maritime Administra-

tion entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; [*] and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11190(i)(2) of title 49, United States Code.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

§ 2344. On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

[* Section 2342(4) so reads although the former Atomic Energy Commission is now the Nuclear Regulatory Commission.]

Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1126

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION[1]

Petitioner contends that the court of appeals erred in dismissing, as not ripe for adjudication, a petition for review of a policy statement issued by the Interstate Commerce Commission (ICC).

1. In July 1984, an ICC policy statement, released after full public notice and comment, abolished the so-called "special circumstances" doctrine in the rail acquisition of

[1]The federal respondents are the Interstate Commerce Commission and the United States.

motor carriers.[2] *Acquisition of Motor Carriers By Railroads*, Ex Parte No. 438 (Pet. App. 8a-37a). By that action, the Commission altered its prior approach under which such acquisitions ordinarily were not approved unless the acquired motor carrier was restricted to operations auxiliary or supplemental to those of the acquiring railroad. The ICC indicated that it would henceforth examine such acquisitions on a case-by-case basis and not impose those restrictions automatically. *E.g.*, Pet. App. 19a-20a. In the future, a railroad seeking to acquire a motor carrier will have to demonstrate that the acquisition is consistent with the public interest, will not unreasonably restrain competition, and will result in the use of the motor carrier to public advantage in the acquiring carrier's overall transportation operations (*id.* at 27a-28a).

2. Petitioner and others sought review of the Ex Parte No. 438 policy statement in the United States Court of Appeals for the Ninth Circuit. The court of appeals

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[2]49 U.S.C. 11344(c) provides in pertinent part that the Commission may approve a railroad's acquisition of a motor carrier "only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition." For many years, and with this Court's approval (see *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951)), the Commission had interpreted this language to require that a rail applicant demonstrate that it would use the motor carrier to public advantage in its *rail* operations, and, unless "special circumstances" were demonstrated, the acquired motor carrier's operations were restricted to insure that its operations were auxiliary to or supplemented the railroad's operations.

Following enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, which loosened regulatory strictures on the trucking and rail industries, the ICC reconsidered its prior interpretation and concluded that these dramatic legislative changes, coupled with current circumstances in the surface transportation industry warranted a new approach (Pet. App. 34a-36a).

dismissed the petitions as not presently ripe for judicial review (Pet. App. 2a), and subsequently amended its opinion (Pet. App. 5a-7a) to provide specifically that "[j]udicial review will be available to challenge an order of the I.C.C. that applies [the policy statement] to a specific factual situation."

3. While those proceedings were pending in the Ninth Circuit, a railroad filed an application with the ICC to acquire a motor carrier.[3] Petitioner opposed that application in the administrative proceedings, and in doing so disputed the validity of the Commission's recent policy statement. The Commission affirmed its Ex Parte No. 438 policy statement, and approved the acquisition pursuant to its revised statutory interpretation. Petitioner then sought review of that decision in the United States Court of Appeals for the District of Columbia Circuit.[4] Thus, petitioner is currently litigating the validity of the Commission's reinterpretation of 49 U.S.C. 11344(c), precisely the question it sought to raise in the Ninth Circuit.

4. As these recent developments confirm, the judgment of the court below is correct and further review by this Court is not warranted.

a. In performing the balancing prescribed by this Court's decision in *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967), the court of appeals correctly concluded (Pet. App. 2a, 7a) that petitioner's challenge to the policy statement was not ripe for review because "[p]etitioners have not shown that the regulation immediately affects their

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[3] *Norfolk Southern Corp.—Control—North American Van Lines, Inc.*, Finance Docket No. 30,500 (I.C.C. Apr. 30, 1985).

[4] *International Brotherhood of Teamsters* v. *ICC*, No. 85-1397 (D.C. Cir. filed June 28, 1985).

day-to-day affairs."[5] Indeed, petitioner does not challenge the court of appeals' conclusions in this regard.

b. Rather than identify any error in the judgment below, petitioner only hypothesizes (Pet. 8-15) that it may be prevented from obtaining review of the Commission's policy statement in the future. Petitioner misapprehends both the court of appeals' decision and the process for review of Commission policy statements.

After being advised of the pendency of the D.C. Circuit proceedings (see Pet. for Rehearing 3), the court below amended its decision in this case to state (Pet. App. 7a) that "[j]udicial review will be available" when the Commission "applies I.C.C. Rule No. 438 to a specific factual situation." Thus, the court expressly avoided the problem petitioner anticipates, *i.e.*, inability to contest the validity of the policy in a later proceeding. And, as petitioner recognizes (Pet. 10 (footnote omitted)), "the government and the merging carriers have acknowledged the jurisdiction of the D.C. Circuit to consider the validity of th[e] policy." As this Court observed in *Toilet Goods*, 387 U.S. at 165, "[s]uch review will provide an adequate forum for testing the regulation in a concrete situation."[6]

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[5]In Ex Parte No. 438, the Commission simply announced a policy reinterpretation of the Interstate Commerce Act that would be applied in future cases. See, *e.g.*, Pet. App. 19a-20a, 27a, 29a-30a (stressing that the revised policy would mean only that cases will be examined on an individual basis without presuming the need for restrictions on the acquisitions).

[6]This case is wholly unlike those in which, petitioner contends (Pet. 10-14), the government has taken an inconsistent position. In neither *Tri-State Motor Transit Co.* v. *ICC*, 739 F.2d 1373 (8th Cir. 1984), cert. denied, No. 84-1515 (June 24, 1985), nor *Texas* v. *United States*, 730 F.2d 409 (1984), amended, 749 F.2d 1144 (5th Cir. 1985), cert. denied, No. 84-1712 (June 24, 1985), had a court of appeals previously held the ICC policies there at issue to be unripe for review. Quite the contrary. In both cases, the Commission policy had already been the

Petitioner then proceeds to a second level of speculation—the possibility that the D.C. Circuit will conclude sua sponte that it lacks jurisdiction, leaving petitioner without any opportunity to obtain judicial review of the ICC policy on the merits. Of course, even if that came to pass, the appropriate time to face the issue is then, and in the D.C. Circuit case, not on the wholly hypothetical basis that presently exists.

In any event, it is highly unlikely that petitioner would find itself without a chance to challenge the Ex Parte No. 438 policy in court. Consistent with this Court's determination in *Toilet Goods*, 387 U.S. at 165, the District of Columbia Circuit has considered how it will proceed when a Commission decision is held to be not ripe for review, but would become ripe more than 60 days after the issuance of the initial policy. The court explained (*Baltimore Gas & Elec. Co.* v. *ICC*, 672 F.2d 146, 149-150 (D.C. Cir. 1982)) that a party

> need not fear preclusion [of review] by reason of the 60-day stipulation in 28 U.S.C. § 2344. A time limitation on petitions for judicial review, it should be

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subject of judicial review and had been upheld on the merits. Thus, the government's position was that the Hobbs Act permits but a single, timely challenge to an agency decision.

Our position in *Tri-State* was based on the fact that the same parties had previously obtained review of the policy statement that formed the basis for a licensing proceeding, and, after failing on the merits in the first court, were again seeking review of that policy. In the government's view, which the court of appeals did not accept, the Hobbs Act barred such actions. Similarly, in *Texas*, the government argued unsuccessfully that parties to a rulemaking who fail to join other parties seeking review under the Hobbs Act, 28 U.S.C. 2344, cannot do so in a subsequent proceeding after the 60-day time limit of that section has run. Neither situation pertains here, or in the D.C. Circuit proceeding, because petitioner will not have previously obtained review of Ex Parte No. 438, and therefore review will be proper (and the court's jurisdiction is in fact not contested) in the application proceeding.

> apparent, can run only against challenges ripe for review. *See Investment Company Institute* v. *Board of Governors of the Federal Reserve System*, 551 F.2d 1270, 1280-81 (D.C. Cir. 1977). In the event that [petitioner], at some future date, should have a ripe case * * * it can file a complaint with the Commission and, if the complaint is rejected, seek our review within 60 days of that Commission order. In the course of that review, the Commission's interpretation * * * would be subject to our scrutiny. * * *

Accord, *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905, 911-919 (D.C. Cir. 1985).

This is precisely how review of Ex Parte No. 438 is currently proceeding. Accordingly, there is no basis for petitioner's fear that some court may, sua sponte, raise the Hobbs Act statutory time limit to bar review of Ex Parte No. 438 (see Pet. 8). In these circumstances, the contention that review is warranted now is wholly without merit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

DOJ-1986-02

Hamersley Iron Pty. Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.
India, Govt's of: Ministry of Railways (INDIA)
Japanese National Railways (JAPAN)
Korean National Railroad (KOREA)
LaSalle & Bureau County Railroad Company
Lenawee County Railroad Company, Inc.
Long Island Rail Road Company
Louisiana & North West Railroad Company
Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummelstown Railroad Company
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company
New Orleans Public Belt Railroad
Northeast Illinois Railroad Corporation
Pacific Fruit Express Company
Pearl River Valley Railroad Company
Pickens Railroad-National Railway Utilization Corp.
Port Authority of New York & New Jersey (The)
Providence & Worcester Company
Public Transport Commission of New South Wales (AUSTRALIA)
Rede Ferroviaria Federal S.A. (BRAZIL)
River Terminal Railway Company
Roberval & Saguenay Railway Company (CANADA)
Roscoe, Snyder & Pacific Railway Company
San Diego & Arizona Eastern Transportation Company
Sierra Railroad Company
Somerset Railroad Corporation
South African Railways (REPUBLIC OF SOUTH AFRICA)
Southern Indiana Railway, Inc.
Spanish National Railways (RNFE) (SPAIN)

Taiwan Railway Administration
(REPUBLIC OF CHINA)
Texas & Northern Railway Company
Upper Merion & Plymouth Railroad Company
Victoria A Minas Railway (BRAZIL)
Wabush Lake Railway Ltd. (CANADA)
Warwick Railway Company
Washington Terminal Company
Yancey Railroad Company

Supreme Court, U.S.
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CLERK

No. 85-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, and ASSOCIATION OF AMERICAN RAILROADS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT ASSOCIATION OF AMERICAN RAILROADS

Of Counsel:
J. THOMAS TIDD
JOHN B. NORTON
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001

BETTY JO CHRISTIAN
(Counsel of Record)
TIMOTHY M. WALSH
JANICE BARBER
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Respondent Association of American Railroads

February 6, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a general policy statement in which the Interstate Commerce Commission announced its decision to review prospective rail-motor acquisitions on a case-by-case basis is ripe for review by the Courts of Appeals prior to application of that policy to any specific transaction.

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IN THE

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OCTOBER TERM, 1985

No. 85-1126

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, and ASSOCIATION OF AMERICAN RAILROADS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT ASSOCIATION OF AMERICAN RAILROADS

Respondent Association of American Railroads ("AAR"), an intervening respondent below,[1] respectfully requests that this Court deny the petition for a writ of certiorari

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[1] A list of the member railroads of the AAR is printed in the Appendix to this Brief at 1a-7a.

seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[2]

COUNTER-STATEMENT

This case concerns the timing of judicial review of a new Interstate Commerce Commission ("Commission" or "ICC") policy on the acquisition of motor carriers by rail carriers.[3] The court below dismissed the petition for review of that policy statement on ripeness grounds, observing that a then-pending Commission proceeding involving application of the policy would provide a full and fair opportunity for judicial review.

In its policy statement, the Commission announced the replacement of a fifty-year-old policy that had rigidly restricted the authority of railroads to acquire motor carriers with a new policy that emphasized the Commission's discretion to evaluate proposed acquisitions on a case-by-case basis under 49 U.S.C. § 11344(c) (1982).[4] The new policy was a response to modern transportation conditions and revisions to the Interstate Commerce Act,[5] all of which required the reduction of regulatory constraints and the encouragement of intermodal operations.[6]

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[2] The decision below is reported at 770 F.2d 810 and is reprinted in the Appendix to the Petition at pages 6a-7a. The Petition will be cited herein as "Pet. at ——."

[3] Ex Parte No. 438, *Acquisition of Motor Carriers by Railroads*, 1 I.C.C.2d —— (July 20, 1984). The Commission's decision is reprinted in the Appendix to the Petition at pages 8a-37a.

[4] The policy statement eliminated the Commission's "special circumstances doctrine," which had created a presumption against rail acquisitions of motor carriers whose operation would not be auxiliary or supplemental to those of the rail carrier.

[5] These legislative changes were embodied in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), and the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

[6] In an earlier companion case, the Commission also revised its policy on licensing rail-affiliated motor carriers. *Applications for*

Despite the fact that the Commission's decision constituted only a general statement of prospective policy that had never been applied to the facts of any proposed transaction, petitioner sought review of the policy statement by the Ninth Circuit. Before that court, the ICC, the United States, and the AAR contended that review of the policy statement was premature because: (1) the interpretive statement had not affected or injured petitioner in any concrete or immediate way; and (2) the statement would not be fit for review until the Commission applied the new policy to a specific proposed acquisition, thereby identifying the concrete factors that satisfy the statutory criteria.[7] The Ninth Circuit agreed that the case was too abstract for judicial review at this time, emphasizing that: "Judicial review will be available to challenge an order of the I.C.C. that applies [the policy statement] to a specific factual situation." Pet. at 7a (citing *Toilet Goods Association v. Gardner*, 387 U.S. 158, 164-66 (1967)).

In so concluding, the Ninth Circuit was aware that a case pending before the Commission would give peti-

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Motor Carrier Operating Authority by Railroads and Rail Affiliates, 132 M.C.C. 978 (1982). Petitioner sought review of that policy in the Fifth Circuit, and its petition was consolidated with a case involving the Commission's application of the new policy in an actual licensing proceeding. *See American Trucking Associations v. ICC*, 682 F.2d 487 (5th Cir. 1982). On review of the consolidated petitions, the court affirmed both the new licensing policy and the grant of the individual license. *American Trucking Associations v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984). The Eighth Circuit has also reviewed and approved the licensing policy in the context of review of an actual license application. *Tri-State Motor Transit Co. v. ICC*, 739 F.2d 1373 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 3502 (1985).

[7] Respondents also demonstrated that, even if the policy statement were deemed ripe for review, it constituted a valid reinterpretation of a Commission-made policy in light of recent statutory amendments and economic developments.

tioner full opportunity for review of its claims. *See Norfolk Southern Corp.—Control—North American Van Lines, Inc.*, —— I.C.C.2d —— (F.D. 30500, May 13, 1985) ("*NS/NAVL*").[8] The Commission proceedings in *NS/NAVL*—in which petitioner was an active participant—focused on the concrete facts that necessarily were not before the ICC in the instant case.[9] After considering an extensive factual record, the Commission approved that transaction.

Petitioner has now appealed the *NS/NAVL* decision to the D.C. Circuit, seeking review of both the policy statement and its application to the proposed consolidation. *International Brotherhood of Teamsters v. ICC*, No. 85-1397 (D.C. Cir. filed June 28, 1985), Brief at 2-3. All parties in that case have agreed that the D.C. Circuit's review of the NS/NAVL transaction will encompass review of the policy statement itself. *See* ICC and U.S. Brief at 29; NS/NAVL Brief at 3. Each party's brief also addresses in detail the administrative record and the factual questions uniquely relevant to the NS/NAVL merger. That case is now fully briefed and awaiting oral argument before the D.C. Circuit.

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[8] That case required the Commission to apply its new policy statement to the proposed acquisition of North American Van Lines, a major motor carrier, by Norfolk Southern Corporation, a holding company that owns five Class I railroads, and to determine if the specific facts of the case satisfied the statutory standards.

[9] To permit resolution of the factual issues before the Commission, the parties in *NS/NAVL* developed a massive record that specifically detailed the transaction's probable impact on competition, the particular intermodal and product distribution services that the consolidated company would provide, and the projected effect of the transaction on shippers, employees, and the transportation of certain commodities. During the year-long proceedings, the parties engaged in substantial discovery, and numerous comments were received from shippers, experts in transportation economics, federal agencies, and state governments.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CORRECT AND EXTREMELY NARROW IN SCOPE

Petitioner's effort to transform a three-sentence *per curiam* opinion into a major pronouncement on the right to judicial review of administrative decisions is both unpersuasive and misleading. The decision below simply determined that review of a particular policy statement should be deferred until it had been applied in an individual case. Far from being an important or "novel" holding, Pet. at 9, the decision below merely constitutes a reasonable application of well-established principles.

As the Ninth Circuit recognized, review of this particular policy statement prior to its application would have been virtually meaningless. The Commission made no findings as to which rail-motor acquisitions would satisfy the public interest, public advantage, and competition criteria specified in the statute. Instead, the ICC merely announced that in the future it would make such findings on a case-by-case basis, weighing the concrete record presented to support each specific transaction against the statutory criteria. The actual effect of the policy thus could not be determined in the abstract, and premature judicial review would have been pointless.

Moreover, the Ninth Circuit knew that the Commission had before it an actual acquisition proceeding in which the challenged policy statement would be applied. The court expressly acknowledged that its analysis of the ripeness issue—including the question of threatened hardship to petitioner if review were deferred [10]—turned on the fact that petitioner would soon have an opportunity for review before a court that had the benefit of a fully developed administrative record.

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[10] *See Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, 3333 (1985); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

The Ninth Circuit's decision was thus grounded on the distinctive facts of this case, and its precedential effect is *de minimis*. Moreover, the decision below creates no conflict with the decisions of other Courts of Appeals and is fully consistent with this Court's admonition that federal courts avoid "entangling themselves in abstract disagreements over administrative policies." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 200 (1983) (quoting *Abbott Laboratories*, 387 U.S. at 148). There is no occasion for further consideration by this Court.

II. PETITIONER IS SEEKING AN ADVISORY OPINION

Petitioner also asks this Court to determine whether the Hobbs Act of 1950, 28 U.S.C. §§ 2341-2351 (1982), authorizes review of ICC policy statements within sixty days of their application in a specific case. Pet. at 11-13. But there was no Hobbs Act issue before the court below. The Ninth Circuit did not hold—nor did any party below contend—that the Hobbs Act precluded review in this case. Moreover, the only issue before the court below concerned review of the policy statement *prior* to its application.[11]

Petitioner has merely chosen this case as a vehicle to seek an advisory opinion on the availability of review in a hypothetical post-application case. This Court, however, has consistently refused to give "such advance expressions of legal judgment upon issues which remain unfocused." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).[12]

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[11] The Ninth Circuit's dictum protecting petitioner's subsequent right to review, while explaining the premises for its decision, does not present a suitable ground for a grant of certiorari. "This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956).

[12] *See also Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam); *FCC v. Pacifica Foundation*, 438 U.S. 726, 735 (1978); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per

Moreover, petitioner's claim that the decision below threatens to "immunize[] agency decisions from review," Pet. at 11, is both insubstantial and contrary to fact. The "threat" petitioner purports to see does not arise from any decision denying post-application review of an administrative decision. To the contrary, the Courts of Appeals have uniformly held that if a challenge to a Commission decision is not ripe when the decision is issued, the Hobbs Act authorizes an appeal when the decision is applied.[13] The sole basis for the "threat" postulated by petitioner is a litigation position that the Government urged—unsuccessfully—in a prior case and that petitioner speculates might be asserted again at some future time. Pet. at 11-12.[14] With respect to this particular policy statement, however, petitioner at this very moment is fully exercising its right to post-application review before the D.C. Circuit in *NS/NAVL*, and the Government has expressly conceded in that case that the Hobbs Act does not bar such review.[15]

In short, no Hobbs Act issue is presented by the decision below, nor has petitioner shown any basis for contriving to insert one at this stage of review.[16] Petitioner's

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curiam); *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

[13] *See, e.g., American Trucking Associations v. ICC*, 747 F.2d 787, 791 (D.C. Cir. 1984) (policy statement); *Tri-State Motor Transit*, 739 F.2d at 1375 n.2 (policy statement); *Texas v. United States*, 730 F.2d 409, 415 (5th Cir. 1984) (regulation), *cert. denied*, 105 S. Ct. 3513 (1985); *Illinois v. ICC*, 722 F.2d 1341, 1349 (7th Cir. 1983) (regulation); *Baltimore Gas & Electric Co. v. ICC*, 672 F.2d 146, 148 (D.C. Cir. 1982) (interpretive order).

[14] The prior case to which petitioner refers is *Tri-State Motor Transit*, 739 F.2d 1373. The AAR was not a party in *Tri-State*.

[15] *See* Brief of ICC and U.S. at 29.

[16] Petitioner's unfounded speculation, Pet. at 10, that the D.C. Circuit might decide *sua sponte* in *NS/NAVL* that the Hobbs Act bars post-application review—despite the contentions of all parties

request for an advisory opinion on the Hobbs Act's applicability to ICC policy statements accordingly should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
J. THOMAS TIDD
JOHN B. NORTON
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001

BETTY JO CHRISTIAN
(Counsel of Record)
TIMOTHY M. WALSH
JANICE BARBER
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Respondent Association of American Railroads

February 6, 1986

—is without foundation and ignores a virtually unbroken line of cases to the contrary in that Circuit. *See, e.g., South Carolina Electric & Gas Co. v. ICC*, 734 F.2d 1541, 1546 (D.C. Cir. 1984); *Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 726 (D.C. Cir. 1984); *Cities of Batavia, etc. v. FERC*, 672 F.2d 64, 72 n.15 (D.C. Cir. 1982); *Geller v. FCC*, 610 F.2d 973, 977-78 (D.C. Cir. 1979) (per curiam); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

APPENDIX

APPENDIX

MEMBERS OF THE ASSOCIATION OF AMERICAN RAILROADS

FULL MEMBER ROADS (U.S. LINES)

Akron, Canton & Youngstown Railroad Company
Alton & Southern Railway Company
Atchison, Topeka & Santa Fe Railway Company
Baltimore & Ohio Railroad Company
    Curtis Bay Railroad Company
    Staten Island Railroad Corporation
Baltimore & Ohio Chicago Terminal Railroad Company
Bangor & Aroostook Railroad Company
    Van Buren Bridge Railroad
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Birmingham Southern Railroad Company
Burlington Northern Railroad Company
[Canadian Pacific Limited—lines operated in U.S.]:
    Canadian Pacific lines in Maine
    Canadian Pacific lines in Vermont
Chesapeake & Ohio Railway Company
    Covington & Cincinnati Elevator Railroad & Transfer & Bridge Company
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Colorado & Southern Railway
Consolidated Rail Corporation
Denver & Rio Grande Western Railroad Company
Detroit & Mackinac Railway Company
Duluth, Missabe & Iron Range Railway Company
Elgin, Joliet & Eastern Railway Company
Fort Worth & Denver Railway
Galveston, Houston & Henderson Railroad Company

[Grand Trunk Corporation—and other lines in the U.S. indirectly controlled by the Canadian National Railways]:
Grand Trunk Western Railroad Company
Detroit, Toledo & Ironton Railroad Company
Central Vermont Railway, Inc.
Duluth, Winnipeg & Pacific Railway Company
[Canadian National Railways]:
Lines in Michigan
Lines in New England
Lines in New York
Lines in Vermont
Green Bay & Western Railroad Company
Houston Belt & Terminal Railway Company
Illinois Central Gulf Railroad Company
Chicago & Illinois Western Railroad Company
Waterloo Railroad
Kansas City Southern Railway Company
Arkansas & Western Railway Company
Fort Smith & Van Buren Railway Company
Kansas & Missouri Railway & Terminal Railroad
Kentucky & Indiana Terminal Railroad
Lake Superior & Ishpeming Railroad Company
Lake Terminal Railroad Company
Louisiana & Arkansas Railway Company
McCloud River Railroad Company
McKeesport Connecting Railroad Company
Maine Central Railroad Company
Portland Terminal Company
Manufacturers Railway Company
Metro North Commuter Railroad Company
Missouri-Kansas-Texas Railroad Company including Beaver, Meade & Englewood Railroad Company
Missouri Pacific Railroad Company
Brownsville & Matamoros Bridge Terminal Company
Chicago Heights Terminal Transfer Company
Doniphan, Kensett & Searcy Railway Company
Weatherford, Mineral Wells & Northwestern Railway Company

National Railroad Passenger Corporation (AMTRAK)
Newburgh & South Shore Railway Company
Norfolk & Western Railway Company
    Chesapeake Western Railway Company
    Lake Erie & Fort Wayne Railroad Company
    Lorain & West Virginia Railway Company
    New Jersey, Indiana & Illinois Railroad Company
    Norfolk, Franklin & Danville Railway Company
Peoria & Pekin Union Railroad Company
Pittsburg & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
    Montour Railroad Company
    Youngstown & Southern Railway Company
Prescott & Northwestern Railroad Company
Richmond, Fredericksburg & Potomac Railroad Company
St. Louis Southwestern Railway Company
Seaboard System Railroad, Inc.
    Gainesville Midland Railroad Company
Soo Line Railroad Company
    Sault Ste. Bridge Company
Southern Pacific Transportation Company
    Holton Inter-Urban Railway Company
    Northwestern Pacific Railroad Company
    Petaluma & Santa Rosa Railroad Company
    Visalia Electric Railroad Company
Southern Railway System
    Alabama Great Southern Railroad Company
    Algers, Winslow & Western Railway Company
    Atlantic & East Carolina Railway Company
    Camp Lejeune Railway Company
    Carolina & Northwestern Railway Company
    Central of Georgia Railroad Company
    Cincinnati, New Orleans & Texas Pacific
      Railway Company
    Georgia Northern Railway Company
    Georgia Southern & Florida Railway Company
    Interstate Railroad Company
    Live Oak, Perry & South Georgia Railway Company
    Louisiana Southern Railway Company

State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee R[illegible] Company
Texas Mexican R[illegible] Company
Union Pacific Railroad Company
Spokane International Railroad Company
Mt. Hood Railway Company
Union Railroad Company (Pittsburgh)
Vermont Railway, Inc.
Western Maryland Railway Company
Western Pacific Railroad Company
Sacramento Northern Railway Company
Tidewater Southern Railway Company
Western Railway of Alabama
Atlanta & West Point Rail Road Company
Winston-Salem Southbound Railway
High Point, Thomasville & Denton Railroad

SPECIAL CANADIAN AND MEXICAN MEMBER ROADS

CANADIAN LINES (in Canada)

Algoma Central Railway
British Columbia Hydro & Power Authority
British Columbia Railway
Canadian National Railways
Canadian Pacific Limited
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway
White Pass & Yukon Corp. Ltd.

MEXICAN LINES (in Mexico)

Chihuahua Pacific Railway Company
[Direction General de Ferrocarriles en Operacion]:
Ferrocarril Sonora-Baja California, S.A. de C.V.
Ferrocarriles Unidos del Sureste, S.A. de C.V.
Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

ASSOCIATE MEMBERS

Alaska Railroad
Aliquippa & Southern Railroad Company
American Refrigerator Transit Company
Apalachicola Northern Railroad Company
Belfast & Moosehead Lake Railroad Company
Boston & Maine Corporation
Springfield Terminal Railway
California Western Railroad
Centromen Puru Incorporated
Chestnut Ridge Railway
Chicago Short Line Railway Company
Chicago South Shore & South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Cities Service Company Railroad
Cliffs Western Australian Mining Co. Pty. Ltd.
(AUSTRALIA)
Colorado & Wyoming Railway Company
Cuyahoga Valley Railway Company
Dardenelle & Russellville Railroad Company
Delaware & Hudson Railway Company
Greenwich & Johnsville Railway Company
Delray Connecting Railroad Company
Devco Railway (Cape Breton Dev. Corp.—Coal Div.)
(CANADA)
Duluth & Northwestern Railroad Company
East Erie Commercial Railroad
East Jersey Railroad & Terminal Company
East St. Louis Junction Railroad Company
Empresa Minera Del Centro Del Peru Railways (PERU)
Essex Terminal Railway (CANADA)
Fepasa-Ferrovia Paulista (BRAZIL)
Fruit Growers Express Company
Genesee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company